Supreme Court, U.S.
FILED
MAY 3 1996
CLERK

No. 95-938

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

IMMIGRATION AND NATURALIZATION SERVICE,
Petitioner,

v.

YUEH-SHAIO YANG,
Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE WASHINGTON LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

Daniel J. Popeo
David A. Price
Counsel of Record
WASHINGTON LEGAL
FOUNDATION
2009 Massachusetts Ave., N.W.
Washington, D.C. 20036
(202) 588-0302

James N. Christman
Dan J. Jordanger
HUNTON & WILLIAMS
951 E. Byrd St.
Richmond, Va. 23219
(804) 788-8200

Date: May 3, 1996

CASILLAS PRESS INC. – 1717 K STREET NW WASHINGTON DC 20036 – 202-223-1220

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IMMIGRATION AND NATURALIZATION SERVICE,
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YUEH-SHAIO YANG,
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On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

BRIEF OF THE WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICUS CURIAE*

The Washington Legal Foundation (WLF) is a public interest law and policy center with supporters nationwide, who believe the judiciary has often overreached in the past in striking down effective approaches to crime prevention. While WLF engages in litigation in a variety of subject areas, WLF devotes a substantial portion of its resources to

participating in litigation in this Court, lower federal courts, and state courts on constitutional issues involved in controlling crime. *See, e.g., United States v. Armstrong* (Sup. Ct. No. 95-157); *Davis v. United States*, 114 S. Ct. 2350 (1994); *California v. Acuna* (Cal. S. Ct. No. S046980).

All parties have consented to WLF's participation. Consent letters from counsel have been lodged with the Clerk of the Court.

STATEMENT OF THE CASE

> *[W]e are not at liberty to disregard language in recent [Ninth Circuit] cases which appears to substitute our discretion for that of the Attorney General.*

Alquisalas v. Immigration and Naturalization Service, 61 F.3d 722, 724 (9th Cir. 1995). This statement in an earlier Ninth Circuit decision sums up what this case is about. The decision below is part of a line of decisions in which the Ninth Circuit has substituted its views on immigration enforcement for the Attorney General's.

Specifically, this is a case in which the Ninth Circuit overruled an agency's application of a statute giving the Attorney General discretion to waive deportation of one who has taken part in a protracted scheme of immigration fraud. The record shows that Respondent performed or participated in the following acts:

1. Respondent and his wife divorced in Taiwan so that she could become a U.S. citizen with "investor" status, which she understood to require that she be unmarried. Pet. App. 7a, 16a.

2. Wife, now single, obtained a fraudulent birth certificate and passport with a false name. *Id.*

3. Respondent and wife remarried in Taiwan. *Id.*

4. Respondent obtained entry to the U.S. as husband of a U.S. citizen. *Id.*

5. Respondent and wife petitioned for immigrant status for their four adult children. *Id.*

6. Respondent's son and daughter claimed to be married in order to allow the daughter to enter the this country. Pet. App. 17a, 23a.

7. Respondent applied for naturalization, claiming to be married to a U.S. citizen-by-birth on the basis of her false birth certificate. Pet. App. 7a.

8. Wife abandoned her false name and had her daughter petition for her to immigrate as a parent of a U.S. citizen. Pet. App. 7a-8a, 17a.

9. Respondent and wife divorced again. Pet. App. 8a, 17a-18a.

10. Respondent and wife remarried again, using her true name. Pet. App. 8a, 18a.

11. Respondent and wife, at the deportation hearing, denied knowing there was anything wrong in all this. Pet. App. 8a, 21a.

12. Respondent falsely claimed he needed the economic support of his children in this country. Pet. App. 23a-24a.

The court of appeals ruled that fraudulent acts and misrepresentations, no matter how many or how long maintained, cannot be considered so long as the motive behind them is to enter and stay in this country. The court ruled not just that the Attorney General cannot make a decision based on multiple acts of fraud of this sort, but that she may not even *consider* such acts when she exercises her "discretion" as to whether to make an exception to the law requiring deportation. In effect, the court declared an amnesty for all fraudulent acts aimed at allowing a deportable person to avoid being deported.

The court's reasoning was as follows:

1. The statute says that an alien "shall" be deported on the order of the Attorney General if he has misrepresented a material fact.

2. But the statute also says that deportation "may, in the discretion of the Attorney General, be waived."

3. The Board of Immigration Appeals had earlier stated that

> Obtaining visas by fraud and misrepresentation shows disrespect for the law, but this is the action for which they seek to be forgiven and should not be held as an adverse factor.

In re Alonzo, 17 I. & N. Dec. 292, 294 (1979); *In re DaSilva*, 17 I. & N. Dec. 288, 290 (1979).

4. The Ninth Circuit had adopted this policy in several of its decisions: *Braun v. INS*, 992 F.2d 1016 (9th Cir. 1993); *Casem v. INS*, 8 F.3d 700, 703 n. 1, 704 (9th Cir. 1993); *Delmundo v. INS*, 43 F.3d 436 (9th Cir. 1994). In particular, the court felt bound by the *Delmundo* holding that fraudulent acts committed in applying for permanent resident status and obtaining a driver's license, social security card, and voter's identification card were an "extension" of the original fraudulent entry.

5. The Ninth Circuit, relying on these cases, extended the "original fraud" principle to cover not just the original fraud but also all other acts of fraud designed to allow the deportable person to remain in the United States. *Braun v. INS*, 992 F.2d 1016 (9th Cir. 1993).

SUMMARY OF ARGUMENT

1. Although the statute on its face commits the waiver of deportation to the agency's discretion, the court of appeals erroneously permitted the Service no discretion at all, instead substituting its own discretion and reviewing the agency decision *de novo*. This standard of review was contrary to this Court's earlier holdings that such agency decision be reviewed for "abuse of discretion."

2. Even if Congress had not expressly committed the waiver of deportation to the agency discretion, the interpretation by the Service of the statute it administers is entitled to some deference under this Court's *Chevron* doctrine. The court of appeals erred by failing to give such deference.

ARGUMENT

I. Where, As Here, The Decision To Waive Deportation Is Expressly Vested in the Agency, That Decision Can Be Reviewed Only For An Abuse of Discretion

The statute at issue in this case provides that an alien "shall" upon the order of the Attorney General be deported if he has misrepresented a material fact. Respondent below conceded he was in this category. Pet. App. 6a.

But the statute goes on to say that the provisions relating to deportation "may, in the discretion of the Attorney General, be waived." 8 U.S.C. § 1251(a)(1)(H). This "discretion" is limited in one direction only: the Attorney General may not even begin to exercise her discretion unless the person is kin to a citizen or someone lawfully admitted and he was otherwise admissible (except for those grounds of inadmissibility which were a direct result of his fraud or misrepresentation). 8 U.S.C. § 1251(a)(1)(H). Nothing in the statute, on the other hand, prescribes conditions under which the Attorney General *must* waive deportation: deportation is the rule, waiver the exception.

In various contexts, there has been confusion about when a decision is "committed to agency discretion by law," and therefore largely *unreviewable* by the terms of APA § 701, and when it is reviewable for "abuse of discretion" under APA § 706. *See* Administrative Procedure Act, 5 U.S.C. §§ 701(a)(2), 706; C. Koch, Jr., *Administrative Law and Practice* 9.7, 9.32 (1985).

> The analytical problem is that of determining when the agency action is "committed to agency discretion" within the meaning of section 10 of the Administrative Procedure Act, and when it merely "involves" discretion which is nevertheless reviewable. 4 Davis, Administrative Law Treatise § 28.16, pp. 80-81; Anno., Administrative Procedure Act, 97 L.Ed. 884, 889.

Ferry v. Udall, 336 F.2d 706, 711 (9th Cir. 1964). An Attorney General's decision not to deport resembles a prosecutor's decision not to prosecute, the classic example of a decision that is not reviewable. *See Cakmar v. Hoy*, 265 F.2d 59, 62 (9th Cir. 1959) (under previous statute, Attorney General need not act at all; if he does, the court has jurisdiction to determine if procedural due process was done).

For the type of decision at issue here, though, this Court has said that the standard of review is "abuse of administrative discretion." *Foti v. Immigration and Naturalization Service*, 375 U.S. 217, 228 (1963). Denial of suspension of deportation as a discretionary matter is reviewable only for "arbitrariness and abuse of discretion." *Id.*, 375 U.S. at 228 n.15. *See generally INS v. Rios-Pineda*, 471 U.S. 444 (1985).

Contrary to this direction, the court of appeals allowed the agency no room for discretion at all. Instead, the court decided that among the several acts listed above, all (except one) must be ignored because they are "intertwined" with the original fraud.

The court below claimed that it was applying an "abuse of discretion" standard. Its reasoning was that it is an abuse of discretion to consider an "irrelevant" factor, and the initial fraud was one such, along with all other frauds directed to the same end. *See also Lising v. Immigration and Naturalization Service*, No. 94-70445, 1995 U.S. App. LEXIS 36638 (9th Cir. December 27, 1995). The Ninth Circuit has since extended this umbrella to cover fraudulent acts committed to gain benefits for one's family as well as oneself. *Id.* In yet another case, it has overruled the BIA on the weight to be given a drug conviction. *Elramly v. INS*, 73 F.3d 220 (9th Cir. 1995), *cert. granted*, 64 U.S.L.W. 3623 (Mar. 19, 1996).

The result of this judicial lawmaking is to erect a complex set of detailed rules governing when the BIA can decline to grant a waiver. These rules were clearly not prescribed by Congress, they are not demanded by the statute, and indeed reasonable people might well conclude that they are ill-founded. For example, it is hard to see why the court below would allow the BIA to consider even Respondent's lack of candor before the immigration judge, since surely that, too, was aimed at allowing Respondent to remain in the United States; in the court's reasoning, this allegedly dishonest testimony was surely as "intertwined" with Respondent's efforts to secure entry, as much an "extension" of the initial fraudulent entry, as were the other fraudulent acts.

None of the Ninth Circuit decisions prescribing when deportation is to be waived, including the decision below, reflect an "abuse of discretion" standard. When a court forbids the agency from considering facts that are plainly relevant to the decision to waive deportation, that court has effectively engaged in *de novo* decisionmaking.

II. The Service Is Entitled To Deference In Interpreting A Statute That It Has Been Charged With Administering

The court below readily accepted the Immigration Board's policy that, when considering a request for a waiver of deportation, the original fraud should be ignored. But the court then declined to accept the agency's other conclusion—namely, that subsequent acts of fraud should *not* be ignored.

Even apart from the discretion that the statute expressly vests in the Service, its interpretation must be given some deference by the courts, unless Congress's contrary intent is clear. *See Chevron, U.S.A. v. National Res. Def. Council*, 467 U.S. 837 (1984); *Motor Vehicle Manufacturers Ass'n v. State Farm*, 463 U.S. 29 (1983). Courts have applied *Chevron* to review of a BIA adjudication. *See Hamama v. Immigration and Naturalization Service*, No. 94-4088, 1996 U.S. App. LEXIS 3908 (6th Cir. March 7, 1996), *citing INS v. Cardoza-Fonseca*, 480 U.S. 421, 445-50 (1987). If anything, somewhat more deference should be shown when an agency creates a policy as to how it will exercise its discretion. And an agency determination whether to grant a waiver of a rule should be given "maximum" deference. *Dickson v. Secretary of Defense*, 68 F.3d 1396, 1408 (D.C. Cir. 1995) (Silberman, J., concurring in part and dissenting in part).

Here, however, the court allowed the agency no deference at all. It accepted the agency's policy to disregard the original fraud without comment but then added an interpretation with which the agency disagrees. Thus, the decision below alters the relationship between

court and agency and departs from traditional notions of the standard of judicial review of administrative actions.

In this case, the Attorney General sought to apply an agency policy in a manner consistent with its regularly applied terms. That policy forgives an alien's "original fraud" for purposes of determining whether to waive deportation. The Attorney General has not sought to revise the policy or to apply it to Respondent in a new or inconsistent matter. 8 C.F.R. §§ 3.1(g), 103.3(g) (1995) (noting that Attorney General and BIA decisions are precedent until overruled by her or by the Board); *cf. Southwestern Bell Telephone Co. v. FCC*, 28 F.3d 165, 169 n.2 (D.C. Cir. 1994) (*citing Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970)) (requiring consistent application of, or explanation of a deviation from, a policy statement). Nor did she seek to deny Respondent a right to a fair hearing on his request for a waiver. 8 C.F.R. § 212.7(a). The only issue subject to appeal, therefore, was whether the Attorney General exercised her discretion in an abusive fashion.

Given the absence of any statutory requirement to forgive the original—much less prior or subsequent acts of—fraud, an unambiguous policy consistently applied, and no express finding that the *policy* constitutes an abuse of discretion, the Ninth Circuit's refusal to defer to the BIA decision in this case was clearly in error.

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CONCLUSION

For the foregoing reasons, the judgment of the court below should be reversed.

Respectfully submitted,

DANIEL J. POPEO
DAVID A. PRICE
Counsel of Record
Washington Legal Foundation
2009 Massachusetts Ave., N.W.
Washington, D.C. 20036
(202) 588-0302

JAMES N. CHRISTMAN
DAN J. JORDANGER
Hunton & Williams
951 E. Byrd St.
Richmond, Va. 23219
(804) 788-8200

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